80-1533

NO.

Office-Supreme Court, U.S.
FILED
MAR 5 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

DR. JIM F. BARHAM,
Petitioner,

VS.

EWELL WELCH, DOUG VESS, ORVILLE TOUGAW AND BILL MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS FRANCIS DONOVAN,
of record, and
ERNEST W. WITT, Attorneys
WITT AND DONOVAN, Attorneys
115 South Second Street
Dardanelle, Arkansas 72834
(501) 229-3446

Attorneys for Petitioner

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

DR. JIM F. BARHAM,
Petitioner,

VS.

EWELL WELCH, DOUG VESS, ORVILLE TOUGAW AND BILL MITCHELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTIONS PRESENTED

1. When two of four voting school board members testify, in federal district court, that, at a termination hearing, no evidence could have been presented by the school superintendent to cause them to vote against the superintendent's termination, has the termination proceeding been unconstitutionally tainted?

2. When a federal district court judge makes a factual finding of actual bias on the part of two school board members who participated in the school superintendent's termination hearing, should this finding be set aside, as a matter of law, in the absence of a holding that the district court finding was clearly erroneous?

LIST OF PARTIES

The parties in this case are those shown in the caption. When this case was commenced additional parties were James "Crock" Frame, a member of the Havana School Board who did not vote for the petitioner's termination, and the Havana School District No. 86. Both of those additional defendants were dismissed by order of the district court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW v

JURISDICTION v

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED v

STATEMENT OF THE CASE vi

ARGUMENT 1

APPENDIX:

Order of Court of Appeals of December 5, 1980 ..... A-1

Opinion of Court of Appeals of November 7, 1980 ..... A-2

Opinion and Order of District Court of November 9, 1979 ..... A-17

TABLE OF AUTHORITIES

Page

Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976) 1

United States v. U. S. Gypsum Co., 333 U.S. 364 (1948) ... 3

Jones & Sons Insurance Agency, Inc. v. Midwest Transportation Service, 593 F.2d 845 (8th Cir. 1979) 3

Rule 52(a), *Federal Rules of Civil Procedure* 3

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported. It is set forth in the Appendix, pp. A-2 through A-16. The opinion and order of the United States District Court for the Eastern District of Arkansas, entered November 9, 1979 is set forth in the Appendix, pp. A-17 through A-23 and is found at 478 F. Supp. 1246. The Order denying petitioner's Petition for Rehearing is set forth at Appendix, p. A-1.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The opinion of the United States Court of Appeals for the Eighth Circuit was entered on November 7, 1980. The Order of the United States Court of Appeals for the Eighth Circuit denying petitioner's Petition for Rehearing and Suggestions for Rehearing en Banc was entered on December 5, 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions involved in this case are the Fifth and Fourteenth Amendments to the Constitution of the United States.

Statutory provisions involved are 42 U.S.C. §1983.

STATEMENT OF THE CASE

I. Proceedings.

Dr. Jim Barham brought this action under 42 U.S.C. §1983 (1976) and state law against the Havana Public School District No. 86, Yell County, Arkansas, and the five members of the Havana School Board (the Board), seeking reinstatement, equitable relief, and damages. His complaint alleged that the defendants, by prematurely terminating his employment contract as superintendent of the Havana School District, deprived him of free speech and due process under the First, Fifth and Fourteenth Amendments, and violated his state contract rights.

At the conclusion of plaintiff's proof, the district court dismissed the action as to the school district and James Frame, a board member who did not vote for termination. The court also dismissed the First Amendment claim. At the close of the five-day jury trial, the court determined as a matter of law that because of the bias of two school board members, the Board had reached its decision to discharge Barham without affording him the fair and impartial hearing required under the due process clause. Accordingly, the court decided to make an equitable award of back pay, but denied reinstatement because the contract period had terminated by the time of trial.

The district court submitted to the jury the issues of damages to professional reputation, punitive damages, and the Board's defense of good faith, but the jury failed to reach agreement on these issues and the court declared a mistrial. The court thereafter entered an order against the four remaining school board members in their official capacities, awarding Barham back pay in the amount of

$14,906.84 and attorneys' fees, expenses, and costs in the amount of $11,044.04.[1]

The four members of the school board sought an appeal from this interlocutory order under 28 U.S.C. §1292(b) (1976). The district court certified the due process question and the circuit court permitted the interlocutory appeal. Appellants argued on appeal that the district court erred

1) in ruling that the Board was not sufficiently impartial to satisfy the requirements of the due process clause of the Fourteenth Amendment;

2) in ruling that the defense of good faith was not applicable to the equitable award for back pay, counsel fees, expenses, and costs; and

3) in making the equitable award against two board members whose impartiality was not attacked and in refusing to dismiss the case as to them.

The case was submitted on June 12, 1980, and decided on November 7, 1980. The Court of Appeals reached only the first issue raised by appellants and held that the manner of discharging Barham did not deprive him of property without due process of law. On December 5, 1980, the Court of Appeals denied petitioner's Petition for Rehearing.

II. Background.

In the summer of 1978, the Havana School Board rehired Barham to serve a third year as school superintendent, under a contract commencing on July 1, 1978. Subsequently, a serious disagreement developed between the Board

[1]The court ruled that good faith was not a defense to this equitable award.

and Barham. At a school meeting on July 3, 1978, Barham presented the annual financial report which showed a balance of approximately $11,000 in the operating fund. Some board members believed that the balance was dangerously low. On July 11th, Barham sent the Board a letter advising them that he had requested Dr. Pilkinton, Director of the Division of Finance and Administration of the Arkansas Department of Education, to look over the district's financial records, and that Dr. Pilkinton had indicated that the school district was in generally good financial condition. On July 18th, the Board held a special meeting to discuss finances and decided to supervise Barham's expenditures more closely. On July 28th, an article appeared in a local newspaper in which Barham defended his school expenditures.

Welch, the president of the school board, called a special meeting for July 31, 1978, to discuss a "serious personnel (superintendent) problem." Barham and his attorney attended this meeting at which the Board discussed school finances and the newspaper article, as well as Barham's outside activities as a teacher for Arkansas Tech University at Russellville, Arkansas, and as a deputy sheriff for Yell County.[2] After Barham stated that he would not consider resigning, the Board, meeting in executive session, decided to hold a hearing on August 4, 1978, to consider termination of Barham's contract. Frame voted against this decision. Barham received notice of the following charges against him:

1. That you have violated your contract with the

[2]Some board members were aware of these activities prior to approving the July 1, 1978 contract.

Havana School District in regards to your outside teaching activities at Arkansas Tech University.

2. That you have violated your contract as a result of your duties as a law enforcement officer with the Yell County Sheriff's Department.

3. That you have been irresponsible in the management of the financial affairs of the Havana School District.

4. That your public utterances to the media have tended to bring discreet upon the Havana School, School Board, and the community in general.

Attending the August 4th hearing were Barham and his attorney, board member Frame and his attorney (supporting Barham), and the other four school board members and their attorney. Several hundred spectators also attended the meeting, most supporting Barham's retention as superintendent.

Welch presided at the termination hearing, and read into the record the Board's evidence against Dr. Barham.

Dr. Barham presented his evidence, supporting his contract and argued that his actions did not warrant termination.

After Barham testified, the members of the Board adjourned into executive session and voted four to zero to discharge him, with Frame refusing to attend the executive session. Barham then brought his lawsuit.

At the trial, all board members testified as to their familiarity with the facts leading up to the termination; however, two of the four board members (Vess and

Mitchell) testified that Dr. Barham could have presented no evidence which would have caused either of them to vote differently at the termination hearing. Then United States District Judge Richard S. Arnold held that Vess and Mitchell had sufficiently prejudged the outcome of the hearing, so that as a matter of law, Dr. Barham had been denied a property right, without due process of law.

ARGUMENT

I.

The United States Court of Appeals for the Eighth Circuit has decided an important question of federal law which was not completely settled by this Court in *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), and in so doing decided a federal question in conflict with this Court's holding in *Hortonville*.

This Court's pronouncement in *Hortonville, supra*, was that mere "involvement" with pre-termination events was not sufficient to overcome the presumption of honesty and integrity in policymakers with decisionmaking power, so as to deny the terminated employee due process of law. *Hortonville, supra*, 426 U.S. at 497. *Hortonville* did not decide what showing of bias or prejudice must be made in order to overcome the presumption vested in school board members.

The Circuit Court of Appeals held that a tentative opinion concerning Dr. Barham's termination, in the instant case, based on their pre-termination official involvement with Barham, is not sufficient evidence on which to base a finding of actual bias. (A-14) This decision extends this Court's holding in *Hortonville* so that even if pre-termination involvement causes two of four board members to reach a tentative decision concerning termination prior to the hearing, no violation of due process has occurred.

Hortonville left the question of the degree of involvement which would disqualify a board member and the

question of whether a board member is "capable of judging a particular controversy fairly on the basis of its own circumstances", *Hortonville, supra,* 426 U.S. at 493, for resolution by the fact finder. The Circuit Court of Appeals indicates that the presumption of honesty and integrity cannot be overcome absent a claim of personal animosity, illegal prejudice, or a personal or financial stake in the outcome. (A-10).

The Circuit Court of Appeals attempted to ease its pain of departure from *Hortonville* by substituting its finding of fact for that of the district judge by esoterically characterizing the bias of the two school board members as tentative bias rather than irrevocable prejudice.

This Court should decide (1) what evidence must be presented or what showing must be made in order to disqualify a board member because his actual bias denies due process and (2) must a showing of personal animosity, illegal prejudice, or a personal or financial stake in the outcome of a hearing be made when school board members admit, at trial, that there was no evidence which could have been presented which would have caused them to vote against termination of a school superintendent?

II.

The decision of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings so as to demand the exercise of this Court's power of supervision.

District Judge Richard S. Arnold (now Circuit Judge), at the conclusion of the presentation of evidence by both sides made the following finding (A-14, 18)

> "The plaintiff was deprived of property without due process because the school board was not sufficiently impartial. * * * Messrs. Vess and Mitchell had their minds made up before the hearing on August 4, 1978; there was no evidence which Dr. Barham could have presented which could have changed their minds about terminating his contract. * * *"

Nowhere in the decision of the Circuit Court of Appeals is there a holding that the district court's finding of fact was clearly erroneous.

Such a finding is clearly required by Rule 52(a), F.R.C.P., which states, in pertinent part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

Without a holding that the trial court was clearly erroneous the Court of Appeals should have affirmed the lower court's decision. That same Court of Appeals, quoted from this Court's decision in *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364 (1948), in *Jones & Sons Insurance Agency, Inc. v. Midwest Transportation Service*, 593 F.2d 845 (8th Cir. 1979), as follows:

> "Our standard of review is well settled. Although

> the factual findings of the trial court are entitled to great weight, they must be declared clearly erroneous if the reviewing court, upon an examination of the entire record, forms the definite and firm conviction a mistake has been committed." 593 F.2d at 848.

Indeed this doctrine has been well settled, but the Circuit Court of Appeals chose to ignore this doctrine and merely substituted its finding of fact for that of the district judge. The Court of Appeals apparently substituted *de novo* review for the standard of clearly erroneous fact finding since there is no declaration that the trial judge was clearly erroneous.

Although the Court of Appeals had the entire record before it, the district judge had the opportunity to see and hear and determine the veracity of witnesses. His decision concerning the true facts in this case was made upon various factors gleaned from live witnesses, rather than from a cold record of words. The district judge viewed and weighed the evidence in the context of the entire trial. The statements made by Messrs. Vess and Mitchell were made at the trial which occurred one year after Dr. Barham's termination hearing. For a school board member to testify, after a lapse of one year, that there was no evidence which could have been presented which would have caused him to even consider changing his mind is not weak and inconclusive, but is conclusive evidence of prejudgment on the part of the board members.

Whether the opinion of the two board members who so testified was tentative or irrevocable is a decision to be

made by the district judge, the fact finder; and his decision should not be disturbed by the Circuit Court of Appeals unless clearly erroneous.

Respectfully submitted,

/s/ THOMAS FRANCES DONIVAN

THOMAS FRANCIS DONOVAN,
of record, and
ERNEST W. WITT, Attorneys
WITT AND DONOVAN, Attorneys
115 South Second Street
Dardanelle, Arkansas 72834
(501) 229-3446

Attorneys for Petitioner

Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 79-2008

September Term, 1980

EWELL WELCH, DOUG VESS, ORVILLE TOUGAW, AND BILL MITCHELL,

Appellants,

vs.

DR. JIM F. BARHAM,

Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

Judge Arnold did not take part in the vote.

December 5, 1980

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 79-2008

EWELL WELCH, DOUG VESS, ORVILLE TOUGAW, AND BILL MITCHELL,

Appellants,

vs.

DR. JIM F. BARHAM,

Appellee.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Submitted: June 12, 1980
Filed: November 7, 1980

Before HEANEY and BRIGHT, Circuit Judges, and HUNGATE, District Judge.*

BRIGHT, Circuit Judge.

Dr. Jim Barham brought this action under 42 U.S.C. §1983 (1976) and state law against the Havana Public School District No. 86, Yell County, Arkansas, and the five members of the Havana School Board (the Board), seeking reinstatement, equitable relief, and damages. His complaint alleged that the defendants, by prematurely terminating his employment as superintendent of the Havana School District, deprived him of free speech and due process and violated his state contract rights.

*WILLIAM L. HUNGATE, United States District Judge, Eastern District of Missouri, sitting by designation.

At the conclusion of plaintiff's proof, the district court dismissed the action as to the school district and James Frame, a board member who did not vote for termination. The court also dismissed the First Amendment claim. At the close of the five-day jury trial, the court determined as a matter of law that because of the bias of two school board members, the Board had reached its decision to discharge Barham without affording him the fair and impartial hearing required under the due process clause.[1] Accordingly, the denied reinstatement because the contract period had terminated by the time of trial.

The district court submitted to the jury the issues of damages to professional reputation, punitive damages, and the Board's defense of good faith,[2] but the jury failed to reach agreement on these issues and the court declared a mistrial. The court thereafter entered an order against the four remaining school board members in their official capacities, awarding Barham back pay in the amount of $14,906.84 and attorneys' fees, expenses, and costs in the amount of $11,044.04.[3]

The four members of the school board sought an appeal from this interlocutory order under 28 U.S.C. §1292(b) (1976). The district court certified the due process

---

[1]The court concluded that the notice and hearing given to Barham otherwise comported with the requirements of due process.
court decided to make an equitable award of back pay, but

[2]Barham decided not to submit the breach of contract claim to the jury.

[3]The court ruled that good faith was not a defense to this equitable award.

question[4] and this court permitted the interlocutory appeal. Appellants argue on appeal that the district court erred

1) in ruling that the Board was not sufficiently impartial to satisfy the requirements of the due process clause of the Fourteenth Amendment;

2) in ruling that the defense of good faith was not applicable to the equitable award for back pay, counsel fees, expenses, and costs; and

3) in making the equitable award against two board members whose impartiality was not attacked and in refusing to dismiss the case as to them.

We reach only the first issue and hold that the manner of discharging Barham did not deprive him of property without due process of law. Accordingly, we reverse the district court.

I. Background.

In the summer of 1978, the Havana School Board rehired Barham to serve a third year as school superintendent, under a contract commencing on July 1, 1978. Subsequently, a serious disagreement developed between the Board and Barham. At a school board meeting on July 3, 1978, Barham presented the annual financial report which showed a balance of approximately $11,000 in the operating

[4]In authorizing the appeal under §1292(b), the district court observed:
The Court is of the opinion that the portion of this order which re-affirms the finding that plaintiff's due process rights were violated involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order may materially advance the ultimate termination of this litigation. If this order is in error, there is no need for a second jury trial.

fund. The treasurer's report showed a balance of approximately $9,800. Several board members believed that the balance was dangerously low. On July 11th, Barham sent the Board a letter, advising them that he had requested Dr. Pilkinton, Director of the Division of Finance and Administration of the Arkansas Department of Education, to look over the district's financial records, and that Dr. Pilkinton had indicated that the school district was in generally good financial condition. On July 18th, the Board held a special meeting to discuss finances and decided to supervise Barham's expenditures more closely. On July 28th, an article appeared in a local newspaper in which Barham defended his school expenditures.

Welch, the president of the school board, called a special meeting for July 31, 1978, to discuss a "serious personnel (superintendent) problem." Barham and his attorney attended this meeting at which the Board discussed school finances and the newspaper article, as well as Barham's outside activities as a teacher for Arkansas Tech University at Russellville, Arkansas, and as a deputy sheriff for Yell County.[5] After Barham stated that he would not consider resigning, the Board, meeting in executive session, decided to hold a hearing on August 4, 1978, to consider termination of Barham's contract. Frame voted against this decision. Barham received notice of the following charges against him:

1. That you have violated your contract with the

[5]Apparently some board members were aware of these activities prior to approving the July 1, 1978, contract. In July, however, an Arkansas Tech official verified Barham's teaching position and a county newspaper article publicized Barham's participation as deputy sheriff in a local drug raid.

Havana School District in regards to your outside teaching activities at Arkansas Tech University.

2. That you have violated your contract as a result of your duties as a law enforcement officer with the Yell County Sheriff's Department.

3. That you have been irresponsible in the management of the financial affairs of the Havana School District.

4, That your public utterances to the media have tended to bring discredit upon the Havana School, School Board, and the community in general.

Attending the August 4th hearing were Barham and his attorney, Board member Frame and his attorney (supporting Barham), and the other school board members and their attorney. Several hundred spectators also attended the meeting, many supporting Barham's retention as superintendent.

Welch presided at the hearing, and read into the record the following evidence: the charges against Barham; the notice of the hearing sent to Barham; Dr. Barham's July 1, 1978, contract;[6] a letter from an official of Arkansas Tech University stating that Barham was under a teaching contract with Arkansas Tech;[7] a newspaper article about a drug raid in which Barham participated; a newspaper article

---

[6]All three contracts with Barham contained a provision which stated that

> The Party of the Second Part (Barham) certifies that at the date of this contract he or she is not under teaching contract with another school district(.)

[7]This letter also stated that Barham had taught several courses in both 1977 and 1978 and had earned $5,350 between January 10, 1977 and July 7, 1978.

that included Barham's statement on the status of school finances; a statement from the county treasurer showing an operating fund balance of $5,318.14 as of August 4, 1978; a letter from Dr. Pilkinton to Barham indicating that the district financial condition was good, although the balance was "not as large as it perhaps should be;" a letter from Barham to the Board discussing Pilkinton's assessment of the school district's finances; and an auditing report showing that the fund balance as of July 1, 1977, was more than $25,000, but as of June 30, 1978, was less than $11,000.

Barham denied none of the essential facts underlying the charges. Rather, in his defense he argued that his actions did not warrant termination. He asserted that 1) his teaching position was not a breach of his contract, did not interfere with his responsibilities as superintendent, and provided additional income necessary to support his family; 2) his uncompensated service as deputy sheriff was not a breach of his contract and benefited the community; 3) the operating fund balance was abnormally low because an extensive building program ,which improved the quality of education in Havana, was financed out of current funds rather than by loans; 4) his statement to the press was a justifiable response to untruthful rumors that he had bankrupted the school district.

After Barham testified, the members of the Board adjourned into executive session and voted four to one to discharge him, with Frame dissenting. Barham then brought this lawsuit.

II. Due Process Violation.

The district court concluded that because the Board was not sufficiently impartial, Barham was deprived of

property without due process of law. The court rested its conclusion on the following evidence. On examination by Barham's attorney, school board member Mitchell testified:

> Q. Now, let me ask you, Mr. Mitchell, at that hearing, was there any evidence which Dr. Barham could have presented which would have made you render a different decision than the one which you ultimately did at the conclusion of that meeting?
>
> A. I don't think so.

On examination by Barham's attorney, school board member Vess testified:

> Q. And my question is: can you bring to mind any circumstances [on August 4th] in which you would have voted to retain Dr. Barham?
>
> A. I still can't answer this question.
>
> Q. You can't imagine any circumstances?
>
> A. No, I didn't say that. I said personally I really liked — that's an unfair question. I really don't know what could have been done, if anything could have been done. I really can't say what I would have done at that time.
>
> * * * *
>
> [The Court] Go ahead and answer, Mr. Vess.
>
> A. I really don't think at that stage of the game — this is my personal opinion — would have changed anything. I sure don't.

On the basis of this testimony the district court concluded:

> If two of the four participating members of the board would not under any circumstances have changed their minds regardless of the evidence presented by Dr. Barham at the hearing, the hearing was useless from Dr. Barham's perspective. Although complete impartiality is not required, fundamental fairness necessitates that the members of the tribunal have no actual bias. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In Re Murchison*, 349 U.S. 133, 136 (1954). Based upon their testimony, the Court must conclude that Messrs. Vess and Mitchell were not "capable of judging [this] particular controversy fairly on the basis of its own circumstances." *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482, 493 (1976), quoting from *United States v. Morgan*, 313 U.S. 409, 421 (1941).

Based on the record as a whole and the policy considerations discussed by the Supreme Court in *Hortonville Joint School District No. 1 v. Hortonville Education Ass'n*, 426 U.S. 482 (1976), we conclude that this testimony does not demonstrate the degree of bias that disqualifies a decisionmaker under the due process clasue.

In *Hortonville*, a Wisconsin school board unsuccessfully negotiated with its teachers and then dismissed them after they engaged in a clearly illegal strike. The Wisconsin Supreme Court held that the board's familiarity with the events leading to the strike prevented it from impartially evaluating the seriousness of the teachers' actions, which was necessary in deciding whether to dismiss them for

striking or to use a less drastic remedy. 225 NW2d 658 (Wisc. 1975). In reversing, the Court stated that

> [a] showing that the Board was "involved" in the events preceding this decision, in light of the important interest in leaving with the Board the power given by the state legislature, is not enough to overcome the presumption of honesty and integrity in policymakers with decisionmaking power. *Cf. Withrow v. Larkin*, 421 U.S. [35] at 47 [1975] [*Hortonville, supra*, 426 U.S. at 496-97.]

At least in the absence of a claim of personal animosity, illegal prejudice, or a personal or financial stake in the outcome,[8] school board members are entitled to this presumption of honesty and integrity. *Hortonville, supra*, 426 U.S. at 497; *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Merely by its involvement in the events preceding Barham's discharge,[9] the Board did not become so tainted as to lose this presumption. *Hortonville, supra*, 426 U.S. at 497; *Norbeck v. Davenport Community School District*, 545 F.2d 63, 69 (8th Cir. 1976), *cert. denied*, 431 U.S. 917 (1977). As the Court stated in *Hortonville*:

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker. *Withrow v.*

[8]The record shows no evidence of this type of actual bias.

[9]During trial Barham's counsel questioned the board members about their knowledge prior to the hearing. This testimony showed that through correspondence, newspaper articles, and meetings the board members gained information that substantiated the charges and learned of Barham's justifications for his actions. Counsel implied in his questioning that as a result of his knowledge, the board members made up their minds before the hearings. The district court, however, did not base its finding of actual bias on the Board's prior involvement.

Larkin, 421 U.S. 35, 47 (1975); *FTC v. Cement Institute*, 333 U.S. 683, 700-703 (1948). Nor is a decision-maker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not "capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941); see also *FTC v. Cement Institute, supra*, at 701. [*Hortonville, supra*, 426 U.S. at 493.]

The district court's conclusion that the Board could not judge the controversy fairly rested solely on the responses given by board members Vess and Mitchell to the hypothetical questions. The four board members who voted for termination were asked whether Dr. Barham could have presented any evidence that would have changed their minds about voting to dismiss Barham. Vess and Mitchell answered that they did not think so;[10] Chairman Welch speculated that he might have voted differently with a "drastic" change in the evidence;[11] and Tougaw vaguely

---

[10]While Mitchell answered, "I don't think so," Vess responded, "I really don't think at that stage of the game — this is my personal opinion — would have changed anything. I sure don't."

[11]

Q. Now, Mr. Welch, was there anything or evidence that Dr. Barham could have said or done or presented that would have changed your mind and caused you not to vote for his dismissal?

A. It's possible, yes. It would have had to have been rather drastic, I would assure you, but it was possible.

Q. Well, could you suggest to the jury something that he might have done that would have caused you not to have voted for his dismissal?

A. I couldn't make an accurate statement that he done any one thing that I wouldn't have. I don't know.

alluded to further consideration if Barham's attitude has been more conciliatory.[12] The district court found that the answers of Welch and Tougaw did not demonstrate bias, but that the answers given by Vess and Mitchell showed that they decided to fire Barham prior to his hearing. The court concluded that their irrevocable prejudgment tainted the termination proceeding seriously enough to constitute a due process violation. Examining the record as a whole, we conclude that under the circumstances of this case, the testimony of board members Vess and Mitchell is insufficient as a matter of law to demonstrate irrevocable prejudgment. *See Withrow v. Larkin, supra,* 421 U.S. at 48 (discussing *FTC v. Cement Institute,* 333 U.S. 683, 701 (1948)).

The hypothetical question required each board member not only to speculate whether anything could have changed his mind, but also to imagine what particular evidence might have altered his decision. The hypothesis contained no "assumed evidence." Barham did not change his position

---

12

Q. Mr. Tougaw, you heard Mr. Welch, Mr. Vess, and Mr. Mitchell's answers to the questions concerning whether or not there is any evidence that Dr. Barham could have presented on August the 4th, which would have caused them to change their minds and not vote for his termination.

I ask you was there any evidence that you can think of that Dr. Barham could have presented that afternoon which could have caused you to vote differently?

A. There could have been different things. If his attitude had been different and he had asked us for us — to let us reconsider some of the past, some of the things that had happened, but I don't recall that ever being asked.

Q. Mr. Tougaw, are you saying that Dr. Barham asked you as the board or asked you personally to reconsider some of the allegations that you might not have voted for termination if he had taken a different attitude on this?

A. I would have had a long look and they would have. I would have really considered it.

on the charges nor did he present any new evidence in his defense at the hearing. Under these circumstances, the mere failure of the two board members to "imagine" evidence that could have changed their minds cannot overcome the presumption of their honesty and integrity.

In addition, the answers given by board members Vess and Mitchell are to indefinite to demonstrate bias. Vess and Mitchell testified that they did not make up their minds until the August 4th hearing. Both gave equivocal responses to the hypothetical question. *See* note 10 *supra*. In fact, Vess repeatedly maintained that he was unable to answer what he considered an unfair question. On cross-examination by his counsel, Vess indicated that he might have changed his mind if Barham had produced different evidence,[13] which is substantially the same testimony given

---

[13]

BY MR. LIGHT:

Q. Mr. Vess, Mr. Donovan asked you some hypothetical questions about the state of your mind at the time of the August 4 hearing.

Let me ask you a hypothetical question about that same subject. If at that hearing Dr. Barham had come in and produced evidence that convincingly showed you an entirely different picture, a satisfactory financial picture for the district, and had said there at this hearing that he would put outside teaching commitments and devote full-time to being a superintendent, and that he would quit his deputy sheriff's connection and quit wearing a uniform and a gun, if he would have shown all of those things, do you think you might have changed your mind about how you voted?

MR. DONOVAN: Your Honor, at this point, I would interpose an objection on the grounds that no proper foundation has been laid to determine a satisfactory financial condition.

There was no board policy related to a satisfactory financial condition.

THE COURT: Overruled.

MR. DONOVAN: Thank you, Your Honor.

(Continued on page A-14)

by the two "unbiased" board members. *See* notes 11 and 12 *supra.*

At the most, the record as a whole demonstrates that the board members tentatively, but not irrevocably, had formed an opinion concerning Barham's termination based on their previous official involvement with Barham. Under the principles enunciated in *Hortonville, supra,* and *Norbeck, supra,* the evidence is insufficient to permit a finding of actual bias or improper judgment in this case.

Accordingly, we direct the district court to enter a judgment of dismissal on the plaintiff's section 1983 action.

HEANEY, Circuit Judge dissenting.

I respectfully dissent. The district court found:

> [T]he plaintiff was deprived of property without due process because the school board was not sufficiently impartial. * * * *Messers. Vess and Mitchell had their minds made up before the hearing on August* 4, 1978; *there was no evidence which Dr. Barham could have presented which could have changed their minds about terminating his contract.* * * *

The portions [of the record] which are determinative are as follows:

(Continued from page A-13)

BY MR. LIGHT:

Q. Might that have changed your mind on the way you voted?

A. I will say this. We would have talked about it a long time in harmony. I didn't have no hard feelings toward anybody.

I personally felt that we had come to a point of no return. If Dr. Barham had approached me with that idea, we would have had a long talk. I promise you that.

Q. Now, let me ask you, Mr. Mitchell, at that hearing, was there any evidence which Dr. Barham could have presented which have [sic] made you render a different decision than the one which you ultimately did at the conclusion of that meeting?

A. [Mr. Mitchell] I don't think so.

* * * *

Q. * * * I want you to think for a moment and tell me if there could have been any circumstances under which you would have voted to retain Dr. Barham. Tell the jury what could have been —

MR. LIGHT: Objection, Your Honor. This is the third time and the witness has answered twice that he can't answer this hypothetical question.

THE COURT: Overruled. The witness has refused to answer the question. The Court thinks it is a proper question. Go ahead and answer, Mr. Vess.

A. [Mr. Vess] I really don't think at this stage of the game — this is my personal opinion — would have changed anything. I sure don't.

If two of the four participating members of the board would not under any circumstances have changed their minds regardless of the evidence presented by Dr. Barham at the hearing, the hearing was useless from Dr. Barham's perspective.

Barham v. Welch, 478 F. Supp. 1246, 1248-1249 (E.D. Ark. 1979). (Emphasis added)

The majority ignores these findings and substitutes itself as the fact finder. On the basis of its conclusion that

neither Mitchell nor Vess made up his mind until the August 4th meeting, it holds that no due process violation occurred. In my view, we are bound by the district court's findings unless we are prepared to state that they are clearly erroneous, and this I cannot do.

It is clear from *Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n,* 426 U.S. 482 (1976), that "mere familiarity" with the facts of a case, gained by a member of the Board of Education in the performance of his or her statutory role, does not disqualify that Board member from deciding the case; but that is not the situation here. The district court found that two Board members had rendered themselves incapable of judging the controversy by taking the position that they would not change their mind on the question of whether Barham should be dismissed regardless of the evidence presented by Barham.

Hortonville also establishes the principle that a decisionmaker is not disqualified simply because he has taken a position on a policy issue related to the dispute; but again, that is not the situation here. In *Hortonville,* the Board of Education had no factual issues to decide. Here, there were a number of such issues to be determined and two members of the Board closed their minds on the factual disputes before Barham had a chance to give his version of the facts. In my view, the district court correctly decided the issues of fact and law presented to it and its decision should be affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

DR. JIM F. BARHAM ..... *Plaintiff*

vs. NO. LR-C-78-267

EWELL WELCH, ET AL ..... *Defendants*

OPINION AND ORDER

This is an action by Dr. Jim Barham, former Superintendent of the Havana School District No. 86 of Yell County, Arkansas, for reinstatement, back pay, and damages. The claims principally relied on were that Dr. Barham's discharge was based on his exercise of First Amendment rights, that the procedures leading to his discharge were defective under the Due Process Clause of the Fourteenth Amendment, and that his discharge was a breach of his employment contract.

The case was tried to a jury for five days. During the trial the Court dismissed the First Amendment claim, holding as a matter of law that the speech in question was not protected. The pendent state-law claim for breach of contract was abandoned. The Court held that the manner of discharging the plaintiff did, as a matter of law, deprive him of property (the remainder of his contract's one-year term) without due process of law. Reinstatement was denied because plaintiff's employment contract had expired by the time of trial. The Court held that plaintiff was entitled to back pay as an equitable incident of the reinstatement he would have received had the case been determined earlier.

The claims for additional compensatory damages (for injury to reputation) and for punitive damages were submitted to the jury under instructions posing the issue of defendants' good faith. The jury was unable to agree, and a mistrial was declared. The Court directed counsel to make submissions on the issue of back pay and related relief. The case is to be re-set for trial some time in 1980.

Pending before the Court are the plaintiff's request for an award of back pay, costs, and attorneys' fees, and the defendants' motion for summary judgment.

During trial, the Court ruled that the plaintiff was deprived of property without due process because the school board was not sufficiently impartial. More specifically, the Court held that Messrs. Vess and Mitchell had their minds made up before the hearing on August 4, 1978; there was no evidence which Dr. Barham could have presented which could have changed their minds about terminating his contract. In their motion for summary judgment, the defendants ask the Court to re-examine that ruling.

The Court has carefully reviewed the arguments of the parties on this question and has studied the portions of the trial transcript submitted by the defendants. The portions which are determinative are as follows:

> Q. Now, let me ask you, Mr. Mitchell, at that hearing, was there any evidence which Dr. Barham could have presented which would have made you render a different decision than the one which you ultimately did at the conclusion of that meeting?
>
> A. I don't think so. (T. 78)

* * *

Q. And our contention is that what was done to Dr. Barham was not fair, and your testimony so far is that you made up your mind during that hearing?

A. [Mr. Vess] That's right.

Q. So my question, while it appears unfair, is very important. I want you to think for a moment and tell me if there could have been any circumstances under which you would have voted to retain Dr. Barham. Tell the jury what could have been —

MR. LIGHT: Objection, Your Honor. This is the third time and the witness has answered twice that he can't answer this hypothetical question.

THE COURT: Overruled. The witness has refused to answer the question. The Court thinks it is a proper question. Go ahead and answer, Mr. Vess.

A. I really don't think at that stage of the game — this is my personal opinion — would have changed anything. I sure don't.

If two of the four participating members of the board would not under any circumstances have changed their minds regardless of the evidence presented by Dr. Barham at the hearing, the hearing was useless from Dr. Barham's perspective. Although complete impartiality is not required, fundamental fairness necessitates that the members of the tribunal have no actual basis. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases." *In Re Murchison*, 349 U.S. 133, 136 (1954). Based upon their testimony, the Court must conclude that Messrs. Vess and Mitchell were not "capable of judging [this] particular

controversy fairly on the basis of its own circumstances." *Hortonville Joint School Dist. No. 1 v. Hortonville Education Ass'n,* 426 U.S. 482, 493 (1976), quoting from *United States v. Morgan,* 313 U.S. 409, 421 (1941). The Court has considered the other arguments raised by the defendants on this issue, including the argument that the claim of impartiality was waived, but does not find them persuasive. The holding of the Court is therefore re-affirmed.

The defendants argue that the complaint should be dismissed as to Messrs. Welch and Tougaw in any event since there was no evidence of bias on their part. The Court cannot agree. They are proper parties defendant in their official capacities as members of the school board. In addition, the jury might find them liable for damages on the basis of bad faith, when this case is re-tried. There was sufficient evidence to go to the jury on that issue at the conclusion of the first trial.

The plaintiff has submitted an affidavit claiming $14,906.84 in back pay. A portion of this claim is designated "remaining travel expenses per contract," and is in the amount of $1,070.00. The defendants challenge this portion of the claim. The plaintiff's response is that $100.00 a month was paid by the school district regardless of whether any travel expenses were actually incurred; the plaintiff characterizes the monthly payment as "simply an emolument of my position as Superintendent." This item will be allowed. The defendants also argue that the plaintiff's income as a lay minister should be deducted. The plaintiff states in an affidavit that he was paid as a lay minister even before he was fired, and the Court accepts this statement. The plaintiff's income as a minister will not be deducted.

It follows that the plaintiff is entitled to the total amount of back pay claimed.

With regard to the claim for attorneys' fees, the defendants argue that an award would be premature if made at this time. The Court cannot agree. The plaintiff is the prevailing party at least with regard to the due process issue, and a computation of attorneys' fees can easily be made for the time spent thus far. The minimum award generally should be no less than the number of hours claimed multiplied by the attorney's hourly rate. *Zoll v. Eastern Allamakee Community School District,* 588 F.2d 246, 252 (8th Cir. 1978). Once this base amount is computed, it may be adjusted by the application of the guidelines set out in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), which were expressly approved by the Court of Appeals in *Allen v. Amalgamated Transit Union Local* 788, 554 F.2d 876, 884 (8th Cir.), *cert. denied,* 434 U.S. 891 (1977).

Here, the plaintiff's attorneys have submitted an itemization of 271.3 hours expended in the prosecution of this suit. The Court has examined the hours claimed and finds that they are reasonable. The defendants make no argument to the contrary. The Court has considered the applicability of the *Johnson* factors, and has specific comments with regard to two of them. First, the legal questions involved in this litigation were somewhat novel and difficult. Second, the results obtained were significant, but the plaintiff has yet to prevail on all the issues in the litigation. As a matter of fact, he has failed oh some issues, *e.g.,* the claim that he was discharged because of the exercise of First Amendment rights. Although this is a factor to con-

sider, all claims which were pressed on plaintiff's behalf were reasonably calculated to advance his interests; attorneys' fees for time spent on such claims should not be denied solely because they did not provide the precise basis for the relief granted. *Brown v. Bathke*, 588 F.2d 634, 637 (8th Cir. 1979). All things considered, including the fact that the plaintiff does not make a claim for an enhanced fee, the Court concludes that a fee should be awarded in the amount claimed. It is based on a reasonable rate of $35.00 an hour out of court and $50.00 in court. A fee of $9,495.50 will therefore be awarded.

The plaintiff also claims $913.61 in expenses and $634.-93 in costs. The defendants challenge the fees and mileage claimed for three witnesses who did not testify. The plaintiff's response is that the three witnesses were considered necessary at the time they were subpoenaed, and became unnecessary only as proof developed at trial. The fees and mileage for these persons will be allowed, and the plaintiff is therefore entitled to the full amount of expenses and costs claimed. Finally, the defendants ask that the Court make the requisite findings to enable review by the Court of Appeals under 28 U.S.C. §1292(b). This request is granted. The Court is of the opinion that the portion of this order which re-affirms the finding that plaintiff's due process rights were violated involves a controlling question of law as to which there is substantial ground for difference of opinion. An immediate appeal from this order may materially advance the ultimate termination of this litigation. If this order is in error, there is no need for a second jury trial.

In summary, the Court's due process holding is reaffirmed, and the defendants' motion for summary judg-

ment is denied. The plaintiff is entitled to an award of $14,906.84 in back pay, $9,495.50 in attorneys' fees, $913.61 in expenses, and $634.93 in costs.

IT IS SO ORDERED this 7th day of November, 1979.

/s/ Richard S. Arnold,
United States District Judge.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 11-8-79 by B. Easterling.